

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN NEFF,

Plaintiff,

vs.

ROBERT BANNISTER, *et al.*,

Defendants.

3:09-cv-00117-LRH-VPC

ORDER

Plaintiff, an inmate at Ely State Prison, is proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. Section 1983. This action was originally filed in the Nevada Seventh Judicial District Court and was removed to this court by defendants on March 4, 2009. Pending before this court is plaintiff's complaint.

Screening Standard Pursuant to 28 U.S.C. § 1915A

The court must screen plaintiff's complaint pursuant to 28 U.S.C. § 1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the

1 alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*,
2 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prisoner Litigation
4 Reform Act (PLRA), a federal court must dismiss a prisoner's claims, "if the allegation of poverty is
5 untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be
6 granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
7 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief may be granted
8 is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard
9 under Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint.

10 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
11 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
12 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
13 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In
14 making this determination, the Court takes as true all allegations of material fact stated in the
15 complaint, and the Court construes them in the light most favorable to the plaintiff. *See Warshaw v.*
16 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint are held to less
17 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
18 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*).

19 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
20 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
21 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of
22 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful
23 factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,
24 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

25 Screening of Complaint

26 This court has screened plaintiff's civil rights complaint pursuant to 28 U.S.C. §1915A.
27 Plaintiff brings this action against the following individuals: Robert Bannister, Medical Director,
28 Nevada Department of Corrections; Joe Brackbill, Director of Nursing at Ely State Prison; and

1 Gregory Martin, medical care provider at Ely State Prison.

2 In this action, plaintiff claims that defendants have been systematically and deliberately
3 indifferent to his serious medical needs regarding his severe back pain for more than one year.

4 Specifically, plaintiff alleges that defendant Brackbill denied plaintiff's informal grievances
5 concerning his medical treatment. He further alleges that defendant Bannister denied his appeal.

6 Prisoners have no constitutional right to an inmate grievance system. *Olim v. Wakinekona*,
7 461 U.S. 238, 249 (1983). Thus, the non-existence of, or the failure of prison officials to properly
8 implement an administrative appeals process within the prison system does not raise constitutional
9 concerns. *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993); *Flick v. Alba*, 932 F.2d 728 (8th
10 Cir. 1991). "[A prison] grievance procedure is a procedural right only, it does not confer any
11 substantive right upon the inmates." *Buckley*, 997 F.2d at 495 (citing *Azeez v. DeRobertis*, 568 F.
12 Supp. 8, 10 (N.D. Ill. 1982); *see also Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). "Hence, it
13 does not give rise to a protected liberty interest requiring the procedural protections envisioned by
14 the Fourteenth Amendment." *Azeez v. DeRobertis*, 568 F. Supp. at 10; *Spencer v. Moore*, 638 F.
15 Supp. 315, 316 (E.D. Mo. 1986). Specifically, failure to process a grievance does not state a
16 constitutional violation. *Buckley*, 997 F.2d at 495. Thus, a prison official's involvement and actions
17 in reviewing prisoner's administrative appeal cannot serve as the basis for liability under a § 1983
18 action. *Buckley*, 997 F.2d at 495. Accordingly, the court finds that the complaint does not state a
19 claim against defendant Brackbill or defendant Bannister based on their decisions on plaintiff's
20 grievances.

21 In regard to defendant Martin, plaintiff alleges that he was seen by defendant Martin, who
22 provided only a three-day supply of ibuprofen, stating that he could not prescribe any more ibuprofen
23 and could not provide any other means of treatment of plaintiff's back pain. Plaintiff further alleges
24 that defendant Martin suggested that plaintiff purchase ibuprofen or aspirin from the canteen, and
25 that he would just have to live with his back pain.

26 A prisoner's claim of inadequate medical care does not constitute cruel and unusual
27 punishment unless the mistreatment rises to the level of "deliberate indifference to serious medical
28 needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The "deliberate indifference" standard involves

1 an objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
2 “sufficiently serious.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501
3 U.S. 294, 298 (1991)). Second, the prison official must act with a “sufficiently culpable state of
4 mind,” which entails more than mere negligence, but less than conduct undertaken for the very
5 purpose of causing harm. *Farmer v. Brennan*, 511 U.S. at 837. A prison official does not act in a
6 deliberately indifferent manner unless the official “knows of and disregards an excessive risk to
7 inmate health or safety.” *Id.*

8 In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's
9 civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere
10 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton*
11 *v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), *citing Estelle*, 429 U.S. at 105-06. “[A]
12 complaint that a physician has been negligent in diagnosing or treating a medical condition does not
13 state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
14 not become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*,
15 429 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995);
16 *McGuckin v. Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992), *overruled on other grounds, WMX Techs.,*
17 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to
18 establish deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332,
19 1334 (9th Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a
20 claim of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

21 The court finds that in this case, plaintiff simply disagrees with the treatment provided to him
22 by defendant Martin. As set forth above, this is insufficient to support an Eighth Amendment
23 medical care claim. Accordingly, the court finds that plaintiff fails to state a claim against defendant
24 Martin.

25 **IT IS THEREFORE ORDERED** that defendants Bannister, Brackbill and Martin are
26 **DISMISSED** from this action with prejudice.

27 **IT IS FURTHER ORDERED** that plaintiff’s motion to intervene (Docket #10) is **DENIED**
28 without prejudice to plaintiff’s right to properly file his motion in the case in which he seeks to

1 intervene.

2 **IT IS FURTHER ORDERED** that all other pending motions in this case are **DENIED** as
3 moot.

4 **IT IS FURTHER ORDERED** that in light of the dismissal of all of the defendants, this
5 entire action is **DISMISSED** with prejudice. The clerk of the court is directed to enter judgment
6 accordingly and to close this case.

7 DATED this 11th day of June, 2009.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE